Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

LINDA KERSTETTER, Individually, and as Personal Representative and Heir of the Estate of David Joseph Huber,

Petitioner,

v.

PACIFIC SCIENTIFIC COMPANY, BEECH AIRCRAFT CORPORATION, RAYTHEON AIRCRAFT COMPANY, BEECH AEROSPACE SERVICES, INC., and RAYTHEON AEROSPACE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner (hereinafter Mrs. Kerstetter) brought suit over defects in a military aircraft that caused the death of her son, a Navy pilot (hereinafter Lt. Huber). The lower courts held that Mrs. Kerstetter's product liability causes of action (including those alleging failure to warn) were barred by the government contractor defense created by this Honorable Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The lower courts also found no issue of material fact as to Mrs. Kerstetter's claims that Defendants had assumed a duty of care after procurement to advise the Navy how to avoid product hazards. The questions presented are:

1. Mrs. Kerstetter alleges that several design features of Lt. Huber's aircraft were defective, including the pilot safety harness buckle's raised vertical vanes, the curvature of the control stick, and the shape of the stick handle. She claims that while the Navy was involved in testing some flight characteristics of the aircraft, the "design features" that she "questioned" and placed "in issue" were designed by Respondents without regard to any precise government specifications. Respondents and the courts below defined the "design feature in issue" to be much broader than the features questioned by Mrs. Kerstetter, and applied the government contractor defense to bar liability because of alleged government involvement in some aspects of this broader design category.

Under *Boyle*, who determines what the "design feature in issue" or "design feature in question" is, and how is such a determination made?

QUESTIONS PRESENTED – Continued

2. **When no precise federal specifications prevented the contractor from properly designing, in compliance with state tort law, the features "questioned" and placed "in issue" by Mrs. Kerstetter, does recovery by Mrs. Kerstetter present a "significant conflict" between an identifiable federal policy or interest and the operation of state law?**

3. The lower courts expanded the federal common law created by *Boyle* by allowing post-procurement conduct, including mere continued use of the aircraft, to serve as retroactive government "approval" of the entire aircraft including any specific design features questioned by Mrs. Kerstetter.

Is post-manufacture or post-procurement conduct dispositive of, or even relevant to, the government contractor defense and the policies underlying *Boyle*?

4. The government did not object to the primary contractor/assembler including standard component parts in the aircraft from manufacturers who were not involved in the overall design of the aircraft, and who admit that they had no contact with the government. The component part manufacturers also admit that the components' defective features in issue were designed without regard to any government specifications.

Is a component part manufacturer who supplies a defective part manufactured and designed without regard to any relevant government specifications immune from liability under the government contractor

QUESTIONS PRESENTED – Continued

defense merely because its component was included in the final product?

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. The Fifth Circuit misapplied *Boyle* by misdefining the "design feature in issue" so broadly as to eliminate all limits on *Boyle*, thus totally insulating private contractors from liability for killing military personnel	6
II. In contrast to *Boyle* and the Eleventh and Second Circuits, the Fifth Circuit, in line with the Third and Sixth Circuits, holds a government contractor immune from liability even when the design features in issue could have complied with state tort law without violating any precise federal specifications	11
III. This Court should grant writ because the Fifth Circuit has improperly held that post-procurement activities are dispositive of the government contractor defense, and there is confusion among the circuits regarding this issue	15
IV. The Fifth Circuit erred in allowing Pacific Scientific, whose component part was not manufactured pursuant to any relevant government specifications, to benefit from the government contractor defense asserted by Beech, the primary contractor who assembled the aircraft	20
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) ..... *passim*

Carley v. Wheeled Coach, 991 F.2d 117 (3d Cir. 1993) 13

Dowd v. Textron, Inc., 792 F.2d 409 (4th Cir. 1986) 20

Gray v. Lockheed Aeronautical Systems Co., 125 F.3d 1371 (11th Cir. 1997) 13

In re Joint Eastern and Southern District New York Asbestos Litigation, 897 F.2d 626 (2d Cir. 1990) 13

Lewis v. Babcock Industries, Inc., 985 F.2d 83 (2d Cir. 1993) 20

Ramey v. Martin-Baker Aircraft Co., 874 F.2d 946 (4th Cir. 1989) 20

Stout v. Borg-Warner Corp., 933 F.2d 331 (5th Cir. 1991) 12, 14

Tate v. Boeing Helicopters, 140 F.3d 654 (6th Cir. 1998) 13

Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989), *cert. denied*, 493 U.S. 935 (1989) ..9, 12

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332(a) 5

28 U.S.C § 1442(a) 5

28 U.S.C. § 2680 2

PETITION FOR WRIT OF CERTIORARI

Linda Kerstetter respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 18, 2000, in order to resolve the conflict between the Second, Third, Fifth, Sixth, and Eleventh Circuit Courts of Appeals, and the conflict between the Fifth Circuit and The Supreme Court of the United States on the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is reprinted in Appendix A ("App. A") hereto at page 1a. The order of the United States District Court for the Southern District of Texas, Corpus Christi Division, granting the subject Motions for Summary Judgment is reprinted in App. A, page 17a. The United States District Court for the Southern District of Texas, Corpus Christi Division's Opinion on its Order Granting Defendants' Motions for Summary Judgment is reprinted in App. A, pages 18a-65a.

JURISDICTION

On March 31, 1999 the United States District Court for the Southern District of Texas entered an order granting Summary Judgment in favor of Respondents. Mrs. Kerstetter filed a timely appeal. On April 18, 2000 the

United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision and entered its opinion. Pursuant to Supreme Court Rule 13, this petition has been filed within 90 days after entry of the judgment.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

"The provisions of this chapter and section 1346(b) of this title shall not apply to –

(c) any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680.

STATEMENT OF THE CASE

Lieutenant David Joseph Huber died serving the United States Navy as a flight instructor. His death was senseless, tragic, and preventable.

Specifically, on February 14, 1995, Lt. Huber flew a training flight in which a student pilot practiced spins and spin recovery techniques over the Gulf of Mexico. To enter a spin, the student pulls the control stick back to raise the nose of the plane. His control stick is linked to the instructor's stick in the rearward cockpit, such that the student's actions move the instructor's duplicate control stick. During spin recovery maneuvers, the student

places the aircraft in a nose-down position, creating negative G-forces that pull both pilots away from their seats toward the canopy.

A seat harness with five straps that came over Lt. Huber's shoulders, around his hips, and between his legs meeting at one buckle, should have secured him from such G-forces. A one-eighth clockwise turn of the rotary buckle would release the straps.

During the student's attempted spin maneuver, his rearward movement of his control stick caused the flight control stick handle in Lt. Huber's cockpit to brush against his harness buckle's raised vertical vanes, thus turning the rotary buckle the requisite one-eighth turn, and releasing Lt. Huber's restraint harness. Consequently, nothing restrained Lt. Huber from the negative G-forces which moments later pulled him away from his seat toward the canopy, as the student pilot attempted recovery from the spin. As a result of the uncommanded release of his safety harness, the negative G-forces propelled Lt. Huber through the aircraft's acrylic canopy, and he fell to his death. The student pilot in the forward cockpit was also injured.

Beech Aircraft Corporation, also known as Raytheon Aircraft Company ("Beech"), contracted with the Navy in 1973 to manufacture the subject model of aircraft, the T-34C. The subject stick handle was not designed with regard to any relevant government specifications and was

merely procured by Beech as an "off-the-shelf item"[1] from Mason Electric Company.

Pacific Scientific manufactured the rotary buckle. Four raised cruciform vanes ran across the buckle's face. *See* photograph at p. 88a. The two vertical vanes were unnecessary to the design of the buckle, and Pacific Scientific admits that they were not required by any known government specifications. The buckle itself was of a "standard production" design[2] used in other aircraft which also experienced similar uncontrolled release problems.[3]

Beech Aerospace Service, Inc., also known as Raytheon Aerospace Company ("BASI"), was the maintenance contractor for the T-34C who contracted to inspect for, report, and address problems with the aircraft, including control stick clearance and buckle problems. The manufacturer, Beech, not the government, wrote the maintenance manual and inspection instructions.

In 1985 and 1986, years after manufacture and delivery of the subject aircraft to the Navy, Beech and BASI attended Field Engineering Action Team ("FEAT") meetings with the Navy at which the hazard that later killed Lt. Huber was discussed. Neither Beech nor BASI proposed a solution nor gave any advice, warnings or

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[1] *See* pp. 79a-82a (the only government specifications regarding the stick handle pertained to its chemical composition and color but not its design or shape).

[2] with an additional crotch strap added for use in this particular model aircraft. *See* p. 40a.

[3] *See* p. 50a.

instructions. Beech and BASI lost or misplaced FEAT meeting minutes for the years 1987 to 1990. After 1991 there is no further mention or discussion of the problem in the minutes. Hence, it is unknown how or why the matter remained unresolved until years later. After more buckle releases, this fatal accident finally happened.

Mrs. Kerstetter brought suit against Beech, BASI, and Pacific Scientific in Texas state court and Respondents removed the case to the United States District Court for the Southern District of Texas based on 28 U.S.C. § 1442(a) and alleging federal jurisdiction under 28 U.S.C. § 1332(a).

REASONS FOR GRANTING THE WRIT

Since this Court handed down the *Boyle*[4] decision announcing the government contractor defense in 1988, the United States Courts of Appeals have inconsistently interpreted it. Specifically, the Fifth, Sixth, and Third Circuits have interpreted the defense in stark contrast to the Eleventh and Second Circuits. The Fifth Circuit has fashioned an interpretation of the government contractor defense in direct contravention of *Boyle*.

The Fifth Circuit's interpretation and application of the government contractor defense in this case expands *Boyle* to such a degree that government contractors can produce defective products with limitless impunity, thus placing United States military personnel at risk. The Fifth

[4] *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

Circuit holds that the government contractor defense bars recovery even when there is no conflict between federal interests and the application of state product safety laws, and where the federal government did nothing to require the product to be defectively designed. This area of the law is ripe for review from this Court. This Honorable Court has not written on this subject in the twelve years since *Boyle*, hence the confusion among the lower courts. The various lower courts urgently need this Court to clarify the *Boyle* opinion so that it may be properly and uniformly applied.

I. The Fifth Circuit misapplied *Boyle* by misdefining the "design feature in issue" so broadly as to eliminate all limits on *Boyle*, thus totally insulating private contractors from liability for killing military personnel.

By arbitrarily overgeneralizing the "design feature in issue" in this case, the Fifth Circuit has licensed government contractors to bar recovery any time they can show general government approval of any portion of their product that encompasses the unapproved defective feature about which the plaintiff actually complains.

Mrs. Kerstetter complains of three defective design features: the safety harness buckle's raised vertical vanes, the curvature of the control stick, and the shape of the stick handle. *See* pp. 66a-77a. The buckle's raised vertical vanes were defective in that they served as traction against which the control stick handle rubbed, causing the uncommanded release of the pilot restraint system. *See* photographic demonstration at p. 88a. The buckle was

part of a standard production design restraint system[5] ordered by Beech, and the vanes were not required by any government specifications. *See* pp. 83a-87a. The stick handle was defective in that it was configured so that the bottom portion of it protruded out such that, in its foreseeable use, it would contact the raised vertical vanes on the buckle. *See* photographic demonstration attached at p. 88a. The handle was not designed with regard to any government specifications and was purchased off the shelf. *See* pp. 79a-82a. The control stick was defective in that it was curved such that, in its foreseeable use, it placed the stick handle too close to the buckle. *See* photographic demonstration at p. 88a, and pp. 66a-77a.

The government manufacturing specification for the T-34C required only that each of the two cockpits (one for the instructor pilot and one for the student pilot) contain a control stick and set of rudder pedals, interconnected with the corresponding controls in the other cockpit. The shape, curvature, and grip of the control stick was not addressed. Minor changes in the design or configuration of the control stick, the grip, or the safety harness buckle, would have prevented this accident without violating any specifications. *See* pp. 66a-77a.

In fact, as testified to by Pacific Scientific's corporate representative, the buckle design in all relevant respects[6]

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[5] *See* p. 40a.

[6] There were specs for webbing material to be used in the belts and for loads and tolerances for the inertial reel, but as the cited testimony shows, these had nothing to do with the design features of the buckle at issue here.

was the product of Pacific Scientific, and was promulgated without regard to any relevant government specifications. *See* pp. 83a-87a. Moreover, the primary documentary evidence relied upon by Beech to demonstrate knowing and discretionary government approval of the specific design features of the buckle *actually depicts the seat harness restraint system with a blank circle where the buckle was to be located. See* p. 76a-78a. The blank circle has no raised vertical vanes nor any other details or features indicated on it. *See* p. 78a.

The government contractor defense could not bar recovery if the design features in issue were the features actually complained about by Mrs. Kerstetter. Those features were admittedly not designed or manufactured pursuant to any government specifications restricting any manufacturer's design discretion. However, because of the appearance of government involvement in "overall" design of the subject aircraft, the lower courts saw the "design feature in issue" as much broader than the actual features complained of by Mrs. Kerstetter.

Respondents bombarded the lower courts with evidence of the Navy consulting with Beech about procuring the subject aircraft. They walked the lower courts through the procurement history of the subject aircraft with its various modifications and testing. Respondents demonstrated how the Navy used the subject aircraft after they procured it, and they passed such continued use off as evidence of retroactive "approval" of the aircraft in general. The lower courts were apparently dazzled by the complex history of the development of the subject aircraft. The Fifth Circuit likened such history to the requisite "continuous back and forth" needed for a

prima facie showing that the government approved reasonably precise specifications.

In all this, Respondents could not show any reasonably precise government specifications that required the buckle to have raised vertical vanes, the stick handle to have its protrusion, or the control stick to have its curve.[7]

The lower courts defined the "design feature in issue" much more broadly than those features about which Mrs. Kerstetter complained. As a result, any government approval of any feature within the same broad category would suffice to insulate the manufacturer from liability for the defects actually in issue, even though *they were neither meaningfully approved* in the exercise of the government's discretionary authority, *nor required* by government design or mandate.

In other words, by redefining the "design feature in issue" to be the entire safety harness assembly, or the entire cockpit, or even the aircraft as a whole, the Fifth Circuit allowed the unapproved design features actually

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[7] Respondents did point to a section of the government procurement specs incorporating "by reference" *all* Beech drawings as "the baseline configuration" of the aircraft to which the specs themselves would apply, but this is inconsequential in the absence of proof that, *as to the design features at issue in this case*, such was more than a mere "rubber stamp" lacking any exercise of actual design discretion by the federal government. Otherwise, this form language in any government spec would always totally immunize any private manufacturer from liability because the government "got precisely what it ordered." *See Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989), *cert. denied*, 493 U.S. 935 (1989). *See also* pp. 66a-77a.

questioned by Mrs. Kerstetter to be "approved by association" with government discretion exercised over other design features within the same product. This wrongfully extends the penumbra of the government contractor defense well beyond the limited scope justified by this Court's interstitial creation of a heretofore nonexistent federal common-law defense.

In any product liability lawsuit, it is the plaintiff who "questions" or "places in issue" the design feature of the product alleged to be defective. *Boyle* clearly does not universally immunize private manufacturers from liability for their own design choices merely because there may have been governmental approval of other design features that are not even "questioned" by the plaintiff or placed "in issue" between the plaintiff and defendant.

This is a topic in need of review and clarification by this Court. Mrs. Kerstetter respectfully requests that she be permitted to fully develop and brief this issue before this Court so that justice may be served, and so that the government contractor defense may be clarified and restored to only those necessary conservative limits carefully enunciated by this Court in *Boyle*.

II. In contrast to *Boyle* and the Eleventh and Second Circuits, the Fifth Circuit, in line with the Third and Sixth Circuits, holds a government contractor immune from liability even when the design features in issue could have complied with state tort law without violating any precise federal specifications.

Mrs. Kerstetter presented adequate summary judgment evidence that the manufacturers could have designed the features about which she complained in compliance with Texas state tort law without violating federal design specifications. *See* pp. 66a-77a. The lower courts do not dispute that Mrs. Kerstetter's evidence on this point was sufficient and persuasive, but instead they assert that even given such evidence the Fifth Circuit's interpretation of the law still bars recovery. Indeed, the lower courts admit that **"no government specifications existed at the time Pacific Scientific designed its buckle or Beech chose to use that buckle that would have prevented the inclusion of a buckle guard or the elimination of the vertical vanes."** *See* p. 56a (emphasis ours).

The lower courts, however, imposed an additional and improper barrier to liability: "[T]he proper focus must be on whether the government *approved* specifications (created by its engineers or the contractors' engineers) that *did not* contain the safer design." *See* p. 56a (emphasis ours). In effect, the lower courts required only approval of specifications whether they were reasonably precise or not, and whether or not they reflected any federal claims or policies at odds with the requirements of state law, and whether or not the "design feature"

criticized by Mrs. Kerstetter was even considered or evaluated, much less approved.[8]

The lower courts held that Mrs. Kerstetter's interpretation of *Boyle* (and hence that of the Second and Eleventh Circuits) was "mistaken." The District Court even noted that it was Mrs. Kerstetter's "interpretation of the government contractor defense that was central to the legal issues in this case" and that her "**argument might be persuasive if presented to the Supreme Court or Congress.**" *See* p. 30a (emphasis ours). This statement was cited by the Circuit Court in its opinion. *See* p. 8a.

Unlike the Eleventh Circuit, the Fifth Circuit does not require that the government dictate the design of the feature in issue for the government contractor defense to apply. The Fifth Circuit claims that it already addressed this issue in *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991), and hence that Mrs. Kerstetter's articulation of the *Boyle* test is "contrary to the case law." *See* p. 8a.

In *Stout*, the plaintiff argued that the Army's specifications for the air conditioner at issue in that case did not prohibit the use of a wire screen that would have prevented the plaintiff's injuries. *See Stout* at 334-35. The Fifth Circuit held that the government contractor defense nonetheless barred recovery.

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[8] As that term is understood under *Boyle*, which is to say meaningfully approved by a conscious government design choice. *See Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir. 1989), *cert. denied*, 493 U.S. 935 (1989).

Likewise, the Sixth Circuit held in *Tate v. Boeing Helicopters*, 140 F.3d 654 (6th Cir. 1998) that the government contractor defense barred recovery even when the manufacturer of a helicopter failed to include a warning of a particular hazard in the operator's manual and the government did not preclude giving such a warning.

The Third Circuit reached a similar decision in *Carley v. Wheeled Coach*, 991 F.2d 1117 (3d Cir. 1993). In *Carley*, the plaintiff was injured when an ambulance flipped over because it had an excessively high center of gravity. The government's specifications provided that the center of gravity should not exceed 43 inches. The contractor complied with the specifications, although it could have lowered the ambulance's center of gravity without violating the specifications. The Third Circuit barred recovery by applying the government contractor defense.

In contrast, the Eleventh Circuit, in *Gray v. Lockheed Aeronautical Systems Co.*, held that "stripped to its essentials, the military contractor defense is available only when the defendant demonstrates with respect to its design and manufacturing decisions that *'the government made me do it.'* " 125 F.3d 1371 (11th Cir. 1997) (quoting *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626, 632 (2d Cir. 1990)). The Eleventh and Second Circuits' view is that the government contractor defense only bars recovery when the tortfeasor demonstrates that the government consciously and prospectively specified that the design feature in issue be the way that it was. This is the correct interpretation of *Boyle*, which specifically anticipated the issue:

> If, for example, the United States contracts for the purchase and installation of an air conditioning-unit, specifying the cooling capacity but not the precise manner of construction, a state law imposing upon the manufacturer of such units a duty of care to include a certain safety feature would not be a duty identical to anything promised the Government, but neither would it be contrary. ***The contractor could comply with both its contractual obligations and the state-prescribed duty of care. No one suggests that state law would generally be preempted in this context.*** *Boyle*, 487 U.S. at 509 (emphasis ours).

This reasoning has unfortunately been ignored by the Fifth, Third, and Sixth Circuits' rapid expansion of the government contractor defense. In *Stout*, the hypothetical air conditioner posited by *Boyle* actually produced the opposite result in the Fifth Circuit than that predicted by this Court in *Boyle*. One might even amend the opinion in *Boyle* to read: "No one [but the Fifth, Third, and Sixth Circuits] suggests that state law would generally be preempted in this context."[9]

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[9] In fairness, Mrs. Kerstetter would point out that the record in *Stout* was so devoid of rebuttal to the contractor's motion for summary judgment that the Fifth Circuit may have had no choice but to affirm. Also, the Fifth Circuit was careful to point out in a footnote that the *Stout* facts were distinguishable from those hypothesized in *Boyle* because *Stout* involved proof that the government actually made a design decision to exclude a safety feature that would necessarily have compromised desired function. The opposite is true with regard to Lt. Huber's plane. *See* pp. 47a, 79a-82a, and 89a-91a. This however, has not sufficed to ameliorate the toxic effects of the dicta in *Stout* on other courts and later decisions.

This Court has assured victims of contractor negligence that when the contractor can comply with both its contractual obligations to the federal government and the state-prescribed duty of care, the government contractor defense will not pre-empt state tort or safety laws. *See Boyle*, 487 U.S. at 509. Such reasoning is in keeping with the purpose of *Boyle* because state law does not conflict with a federal interest when the contractor is held liable for a design feature *not dictated by the federal government.*

Mrs. Kerstetter demonstrated that Respondents could have complied with their contractual obligations and Texas State tort law. *See* pp. 66a-77a. Mrs. Kerstetter even demonstrated through Respondents' own admissions that none of the design features complained about were designed with regard to any government specifications and that most were merely features of components that were off-the-shelf purchases. *See* pp. 79a-87a. However, such a showing was to no avail because of the Fifth Circuit's misunderstanding of *Boyle.*

The Fifth Circuit is incorrect in its application of the interstitial common law enunciated by this Honorable Court, and Mrs. Kerstetter respectfully requests that this Court allow her to fully brief this issue and present it before this Court.

III. This Court should grant writ because the Fifth Circuit has improperly held that post-procurement activities are dispositive of the government contractor defense, and there is confusion among the circuits regarding this issue.

The Fifth Circuit allowed post-procurement "continued use" of the plane, and post-procurement government

involvement addressing design features not even in issue to serve as retroactive "government approval" of the entire product. This is an inappropriate expansion of *Boyle* because, by its own terms,[10] *Boyle* must apply to design decisions made at or prior to the time that the product is actually procured.

In April of 1973 the Navy and Beech negotiated a contract to modify the T-34C's predecessor[11] from a piston engine trainer to a turboprop. *See* p. 34a. Following tests of the prototype, in 1975 the Navy and Beech contracted for the actual production of the subject model of aircraft[12] according to specifications. *See* p. 38a.

These and subsequent specifications required only that each cockpit contain a control stick and set of rudder pedals, interconnected with the corresponding controls in the other cockpit. During testing of the prototypes, Beech identified deficiencies with the existing restraint system, and in 1975 ordered off the shelf by part number a standard Pacific Scientific restraint system that included the subject raised vertical vanes on the buckle. A fifth crotch strap was added to this standard production design to reduce shifting of the pilot in his or her seat during acrobatic maneuvers.[13] *See* p. 39a. Even after testing the new fifth crotch strap and the rest of the standard restraint harness, Beech's own report to the government

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[10] And as interpreted by the Second and Eleventh Circuits.

[11] The so-called T-34B.

[12] The T-34C.

[13] The predecessor aircraft had only a four-strap restraint system with no crotch strap.

left blank and unaddressed the design of the buckle itself and its face. *See* pp. 76a-78a. Subsequent government evaluation of the aircraft expressed satisfaction with the addition of the fifth strap. The design features at issue in this case, however, were never mentioned. The Pacific Scientific part number for the standard restraint harness, including a standard four vane buckle, was specified to receive the additional, fifth, strap, and the T-34C model aircraft went into production.

In 1980 during the crash landing of another T-34C, the subject model of Pacific Scientific buckle was bent, impairing the pilot's ability to escape the cockpit. *See* pp. 42a-43a. The Navy then asked Pacific Scientific to add a strengthening screw to address this design defect. *See* p. 43a. The strengthening screw had nothing to do with the defect about which Mrs. Kerstetter complained, the raised vertical vanes. *See* pp. 66a-77a.

In 1982, the Navy contracted with Beech for the delivery of 120 more of the subject aircraft, including Lt. Huber's, referencing specifications that again did not address the design features complained about by Mrs. Kerstetter – the stick, its grip, and the raised vertical vanes on the buckle. *See* p. 44a.[14] In fact, the government specifications for Lt. Huber's aircraft no longer even called out the restraint system by Pacific Scientific part number. *See* p. 44a.

Several years after procurement of the subject aircraft, in a 1985 meeting, the Navy discussed with Beech and BASI a problem with the subject aircraft whereby the

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[14] Except as noted in footnote 7, *supra*. *See* p. 44a.

control stick handle could contact the raised vertical vanes of the buckle causing an uncommanded release of the pilot. *See* p. 46a. Pacific Scientific had knowledge of similar mishaps with the same buckle design previously used in other aircraft, but it was not at the meeting and was apparently not consulted by anyone.[15] Ten years later, and after the very same defects caused Lt. Huber's death, the Navy asked to have the vertical vanes removed from the buckle and to have a raised buckle guard installed to cover 270 degrees of the circumference of the buckle edge. These were the same solutions long since used by Pacific Scientific to solve the same design defect in the other model aircraft.[16] These modifications did not adversely affect any existing government interest or design criteria. *See* p. 47a, and pp. 89a-91a.

The Fifth Circuit incorrectly allowed Beech and Pacific Scientific to use the Navy's "continued use" of the aircraft after the 1985 meetings and before Lt. Huber's death to serve as proof of "government approval." As to Pacific Scientific, the lower courts allowed the addition of a strengthening screw to serve as government approval of the design feature of the buckle about which Mrs. Kerstetter complains, even though such post-procurement conduct had nothing to do with the raised vertical vanes.

The issue of whether post-procurement conduct is dispositive of the government contractor defense is ripe for review by this Court.

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[15] *See* p. 50a.

[16] An Army helicopter, the Sikorsky Blackhawk.

There is nothing in *Boyle* that supports the use of post-design events or post-procurement conduct in applying the government contractor defense. The reasoning for rejecting a *post hoc* or *de facto* approval approach is apparent in the rationale for establishing a government contractor defense in the first place – to address an apparent conflict between state law and federal interests in government procurements. *Boyle*, 487 U.S. at 507. Particularly with respect to military procurement, the idea is to avoid a contractor's refusal to design and manufacture a particular product or an intolerable jump in price for doing so. *Boyle*, 487 U.S. at 507.

To apply the government contractor defense on the basis of government action taken only after the purchase is to completely miss the only justification for a rare "federal common law" defense. How can a contractor refuse to manufacture a product because of a dangerous design requested by the government when the danger is unknown, when the government does not request the design, and/or when that design defect is not even considered or discussed? How can a contractor raise the price of its product to account for federally imposed design defects that are not, in fact, imposed by the government, that already exist prior to any government involvement, and/or that are unknown to anyone at the time of manufacture and sale?

Boyle is concerned with the government's procurement decision, and only insulates contractors from liability to the extent necessary to protect the federal government from its indirect effects. Hence, it does not and cannot insulate contractors who act without governmental input in designing the feature "in issue."

This is an issue riddled with confusion among the lower courts and in need of clarification. *Lewis v. Babcock Industries, Inc.*, 985 F.2d 83 (2d Cir. 1993); *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989); *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986).

IV. The Fifth Circuit erred in allowing Pacific Scientific, whose component part was not manufactured pursuant to any relevant government specifications, to benefit from the government contractor defense asserted by Beech, the primary contractor who assembled the aircraft.

Pacific Scientific's own representative admits that the safety harness buckle was not designed or manufactured with regard to any relevant government specifications. *See* pp. 83a-87a.

As noted above, the only government involvement with the buckle had to do with adding a design feature not in issue,[17] and no government discretion was exercised over the design features actually complained of by Mrs. Kerstetter – the raised vertical vanes.

Astonishingly, the District Court nonetheless held that:

> It may be true that no government specifications existed at the time Pacific Scientific designed its buckle or Beech chose to use that buckle that would have prevented the inclusion of a buckle guard or the elimination of the vertical vanes. It

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[17] The strengthening screw in response to the 1980 crash accident.

> is true, however, that reasonably precise specifications came into existence when *Beech* chose to use the buckle. *See* p. 56a (emphasis ours).

Even though the lower courts admitted that the buckle face was not designed with regard to any government specifications, the lower courts allowed Pacific Scientific to bootstrap itself into the protections of *Boyle* because of design choices made not by the government, but by another private contractor. This Court held in *Boyle* that when a federal procurement officer orders a standard piece of already designed equipment off the shelf, such as by model number, it is "impossible to say that the Government has a significant interest in that particular feature." *Boyle*, 487 U.S. at 509. Such is quite certainly impossible in this case because, in the case of Lt. Huber's plane, it was actually Beech, not the government, that ordered the restraint system by part number. *See* p. 44a. Either way, it was merely an off-the-shelf purchase.

Therefore, the issue of whether a component part manufacturer can, for some reason totally unconnected with the reasoning in *Boyle*, somehow borrow the application of the government contractor defense asserted by the assembler of the overall product is one in need of attention from this Court.

CONCLUSION

The lower courts defined the "design feature in issue" in this case so broadly as to engulf the few features about which Mrs. Kerstetter really complained. Those few features were not designed in obeisance to any precise

specifications promulgated by a federal officer in the exercise of thoughtful discretion. Mrs. Kerstetter demonstrated that Respondents could have complied with Texas State product safety laws without affecting any federal interest, and yet the lower courts pre-empted her case. Post-procurement conduct affected the outcome of Mrs. Kerstetter's causes of action despite *Boyle's* focus on the time of design and procurement. A component part manufacturer whose design was its own and whose product was purchased off the shelf inexplicably rode the coattails of the manufacturer/assembler of the finished product to immunity from responsibility for an unnecessary and preventable death.

For the foregoing reasons, Mrs. Kerstetter respectfully asks this Honorable Court to grant her petition for writ of certiorari.

Respectfully submitted,

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